

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC84035**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**CORNEALIOUS M. ANDERSON,**

**Appellant.**

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**APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY  
ELEVENTH JUDICIAL CIRCUIT  
THE HONORABLE LUCY D. RAUCH, JUDGE**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal is from Appellant's convictions for the Class A felony of robbery in the first degree (§ 569.020, RSMo 2000) and armed criminal action (§ 561.015, RSMo 2000). Appellant was convicted in the Circuit Court of St. Charles County and was sentenced to ten years for the robbery conviction and three years for the armed criminal action conviction, with the sentences to run consecutively. Following an opinion of the Missouri Court of Appeals, Eastern District, affirming Appellant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

## **STATEMENT OF FACTS**

The only issue in this robbery case is whether the trial court properly admitted into evidence a brochure for Beretta semi-automatic pistols that police found in Appellant's apartment. Appellant was charged with one count of the Class A felony of robbery in the first degree (§ 569.020, RSMo 2000) and one count of armed criminal action (§ 571.015, RSMo 2000) pertaining to the robbery of a fast-food restaurant employee making a night deposit at a St. Charles, Missouri, bank (L.F. 12-13). Appellant was tried before a jury convicted of both counts in St. Charles County Circuit Court, the Honorable Lucy D. Rauch, presiding (L.F. 9). Appellant was sentenced to ten years on the robbery conviction and three years on the armed criminal action conviction, with the sentences to run consecutively (L.F. 9, 48-49). The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the evidence at trial showed the following.

At approximately 11 p.m. on August 15, 1999, Leon Kerns, the assistant manager at a St. Charles Burger King, drove to the Mercantile Bank in St. Charles to make a deposit of the restaurant's daily cash receipts, which exceeded \$2000 (Tr. 10, 12, 21-23, 37). Mr. Kerns pulled up to the night deposit box, and as he put his key in the box drawer he heard footsteps (Tr. 11, 23-23). Appellant and Laron Harris, Appellant's stepbrother, approached Mr. Kerns and stuck two guns in his face (Tr. 11, 19-20, 25, 146). Mr. Kerns testified at trial that the guns were the type "in which the clip goes into the handle" (Tr. 25). Both Appellant and his stepbrother had guns and both were wearing masks when they approached Mr. Kerns (Tr. 19-20, 24). Mr. Kerns was told to drop the bags containing the deposit or

they would blow his “f’g head off” (Tr. 11, 26). Appellant and his stepbrother grabbed the bags, warned the victim not to follow them, and ran across the bank’s lawn toward a row of apartments (Tr. 17-18, 40).

After waiting a few moments, Mr. Kerns chased the robbers (Tr. 18). While he was standing in the street, Mr. Kerns saw a small blue car come “screaming” out of a side street and drive past him (Tr. 18, 42). As Mr. Kerns was getting the car’s license number, the car’s headlights went off and it crested a hill (Tr. 18).

Approximately four or five hours after the robbery, police located the blue vehicle bearing the same license plate number in an apartment complex near the bank (Tr. 19, 65, 71-73). The police obtained a warrant and searched the vehicle, which Appellant owned (Tr. 99, 102). In it they found a payroll document for Appellant, Appellant’s checkbook, Appellant’s insurance card, and a Sam’s Club card issued to Appellant and containing his photo (Tr. 103-05). St. Charles police interviewed Appellant’s stepbrother after he was spotted circling the area near where the vehicle was parked (Tr. 81-82, 129). Shortly after that interview, Appellant reported his car stolen (Tr. 106, 129).

The police also searched Appellant’s St. Louis City apartment, which he had abandoned following the robbery (Tr. 107). In that search, police recovered a video rental slip from a Schnucks store located a block and a half from where the robbery occurred (Tr. 107-09). The slip was issued to Appellant’s girlfriend, Vanessa Christako, and was dated and timed just four hours before the robbery occurred (Tr. 107-09). Police also found a

brochure for Beretta semi-automatic pistols (Tr. 109-11).<sup>1</sup>

After staking out Appellant's girlfriend's apartment in St. Charles, police decided to interview her (Tr. 86, 111). After Appellant's girlfriend allowed them into her apartment and told the officers that no one else was there, the officers heard a noise in a back room (Tr. 87, 112). When the officers investigated, they found Appellant in the bedroom hiding under some bedding (Tr. 87, 112). Appellant was arrested and given his Miranda warnings (Tr. 88, 113).

Thereafter, Appellant admitted that he was a partner along with his stepbrother, Laron Harris (whom Appellant referred to as Jay), in the robbery (Tr. 90-91). Appellant admitted that he and his stepbrother had a gun and wore masks when they robbed the victim (Tr. 90-91). Appellant told the police that they had parked in the apartments near the bank and ran up to the victim while he was making a night deposit (Tr. 91-92). Appellant's stepbrother, who Appellant claimed was armed with a BB pistol, told the victim to drop the bags or he would blow his "M..F." head off (Tr. 95-96, 117). When the victim hesitated, Appellant admitted that he told the victim to "drop it" or "give it up" (Tr. 117). The victim dropped the bags and Appellant's stepbrother picked up the money (Tr. 117). Appellant and his stepbrother then ran behind the bank and through the apartments toward Appellant's car

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<sup>1</sup>A copy of this brochure is contained in the Appendix, pages A1-A2. An envelope (State's Exhibit 32) containing this brochure, which was marked as State's Exhibit 32C, has been filed with this Court.

(Tr. 117-18).

Appellant admitted that as they were driving away they saw a police car, turned into an apartment complex, and abandoned the car (Tr. 118). Appellant also stated that after they abandoned the car, his stepbrother put the gun and mask into a dumpster (Tr. 92, 127-28). The pair then started making phone calls to get a ride (Tr. 127-28). Appellant's girlfriend later picked them up in the apartment complex where they had abandoned the car (Tr. 91-92, 129). Appellant admitted that he received half of the money taken during the robbery (Tr. 90-91, 128). The police never recovered the guns or masks used in the robbery (Tr. 96).

During his trial testimony, Appellant claimed that the robbery was his stepbrother's idea and that he was unaware of his stepbrother's intention to rob the victim until it was occurring (Tr. 150-57). Appellant also testified that he did not have a gun and that he simply pointed his finger at the victim when the victim hesitated in handing over the money and began reaching into his car (Tr. 173, 197, 203-04). Appellant testified that he received half of the robbery proceeds (Tr. 195-96).

The jury found Appellant guilty of both robbery in the first degree and armed criminal action (L.F. 44-45). The trial court later followed the jury's recommendation and sentenced Appellant to ten years on the robbery conviction and three years on the armed criminal action conviction, with the sentences to run consecutively (L.F. 44-45, 48-49). The trial court overruled Appellant's motions for judgment of acquittal and for a new trial and this appeal followed (L.F. 9-11).

## **ARGUMENT**

**The trial court did not abuse its discretion in admitting into evidence a brochure for Beretta semi-automatic pistols because this brochure was relevant to prove that Appellant was guilty of both robbery in the first degree and armed criminal action in that it was found during a search of Appellant's residence; it corroborated the victim's testimony that a gun was used during the robbery and that both Appellant and his stepbrother had guns; it corroborated the victim's testimony that the guns used during the robbery were of the type in which the clip goes into the gun handle; and it impeached Appellant's statement to the police and his trial testimony that he did not have a gun during the robbery.**

Appellant's only claim of error involves the admission into evidence of a brochure depicting Beretta semi-automatic pistols that police discovered at Appellant's residence. The trial court properly admitted this brochure into evidence because it was relevant to prove that Appellant was guilty of first degree robbery and armed criminal action in that the guns depicted in the brochure were similar to the guns the victim described at trial as being wielded by the robbers.

Alternatively, even if this evidence was irrelevant, Appellant was not prejudiced because admission of the brochure was not "outcome-determinative" and, therefore, its receipt into evidence constituted, at most, harmless error.

### **Standard of Review**

This Court reviews the evidence presented at trial in the light most favorable to the verdict. *State v. Storey*, 901 S.W.2d 886, 891 (Mo. banc 1995). The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court “for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.” *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

### **The Circumstances Surrounding The Admission of The Brochure Into Evidence**

The issue in this case arose when the state offered into evidence various items the police seized from Appellant’s St. Louis City apartment shortly after the robbery (Tr. 105-07). One item police discovered was a brochure for Beretta semi-automatic pistols:

- Q. Detective Sutton, I’m going to hand you what’s been marked as State’s Exhibit 32, which is an evidence package, and ask you if you can identify that. I want to ask you to open it since I don’t seem to be able to do it.
- A. Yes, this is an evidence envelope that I had made out, my name is under here, and it contains a movie rental slip that I just spoke of, a letter addressed to [Appellant] from the Division of Family services, or excuse me, Division of Employment Security Unemployment, and also, it’s got a Beretta Magazine brochure for semi-automatic handguns, and also All-State Auto Insurance Company for [Appellant], these were the items that is I had seized on

Connecticut from his apartment after he abandoned it.

Q. Okay. I'll open it for you.

The Court: And what exhibit number was that?

[The Prosecutor]: That's 33. I tell you what, Judge, unless somebody particularly wants to see it let's just leave it this way, make it a lot easier, just leave it in the package.

A. Well, it's already kind of open, but it's up to you, sir.

The Court: But that's what it contains is items listed—

A. Yes, 1, 2, 3 and 4.

Q. (By [the Prosecutor]) All right. And you have described them.

[The Prosecutor]: Offer State's Exhibit 32, Your Honor. I'm just going to leave it intact, Your Honor.

The Court: 32, all right. Any objection?

[Appellant's Counsel]: Only to the brochure for the Beretta handgun, Your Honor. That's not relevant.

[The Prosecutor]: Well, I think it is.

The Court: As to that objection the objection is overruled. Okay. State's Exhibit 32 will be received in evidence.

(Tr. 109-11).

Although the robbery victim could not identify his assailants because they wore masks, he did testify that both robbers had guns which they pointed at him (Tr. 11, 19-20,

24-25). During Appellant's cross-examination, the victim testified that both robbers carried the same type of gun:

Q. Okay. Well, did they both point these guns at you at the same time, or did one start first?

A. I heard footsteps, I turned around, two guns were stuck in my face.

Q. Both of them at the same time?

A. Yes.

Q. About how far away were the guns from your face?

A. About two foot.

Q. Okay. Did they both have the same type?

A. They both looked about the same, yes.

Q. What type of guns were they?

A. It's the kind where the clip goes in the handle.

Q. Could you tell if they were chrome or blue, nickel or blue?

A. Big.

(Tr. 25).

Also significant in considering the relevancy of the brochure is the fact that the police never recovered any of the guns used in the robbery (Tr. 96). In Appellant's confession to the police, he claimed that only his stepbrother carried a gun, which he described as a BB pistol, and that they threw the gun into a dumpster following the robbery (Tr. 90-92, 95-96).

The relevancy of the brochure was even more apparent after Appellant took the stand in his own defense. Appellant testified that he did not have a gun during the robbery and denied pointing a gun at the victim (Tr. 173). He said he only pointed his finger at the victim when the victim hesitated in turning over the bank bags (Tr. 197, 203-04). He also testified that his stepbrother had the only gun, which he claimed was a BB pistol (Tr. 161). During cross-examination, Appellant admitted that the gun brochure was found in his apartment and that he was aware of it:

Q. I want to show you what's been marked State's Exhibit 32C. Have you ever seen 32C before?

A. I have seen this.

Q. Where was that?

A. This was one of my neighbor's. He had got it from a gun show.

Q. Found in your house; wasn't it?

A. Yes.

Q. That is not a BB gun; is it? That's a Beretta? That's a series of Beretta's; isn't it?

A. Yes.

Q. And you're familiar with Berettas; aren't you.

A. No, I am not, sir.

Q. Never went to a gun show?

A. I never went to a gun show, no.

[The Prosecutor]: Offer State's Exhibit 32C, which is actually one of the items in

32 which was previously admitted.

The Court: Any objection?

[Appellant's Counsel]: Your Honor, I objected to that before as it's irrelevant.

The Court: Would counsel approach the bench, please?

\* \* \*

[The Prosecutor]: That had been admitted yesterday.

The Court: And that's true, because I did rule that that was part of the unopened package. State's Exhibit—is it 32?

[The Prosecutor]: 32—let me take a look at it. 32C.

The Court: And this was found in the residence; is that right?

[The Prosecutor]: Yes.

The Court: I'll allow that over Defendant's objection.

(Tr. 201-02).

### **Evidence Is Relevant If It Tends To Prove Any Fact In Issue**

“Physical evidence is admissible ‘if it throws any relevant light upon a material matter in issue.’” *State v. Friend*, 822 S.W.2d 938, 944 (Mo. App. S.D. 1991), *quoting State v. Murphy*, 592 S.W.2d 727, 730 (Mo. banc 1980). Evidence is relevant if it tends to prove or disprove a fact in issue, or if it corroborates evidence that is relevant and bears on a principal issue. *State v. Pierce*, 927 S.W.2d 374, 376 (Mo. App. W.D. 1996); *State v. Bounds*, 857 S.W.2d 474, 477 (Mo. App. E.D. 1993). “Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.” *State v. Wayman*, 926 S.W.2d 900, 905 (Mo. App. W.D. 1996). Evidence need only be relevant, not conclusive, to be admissible, and before evidence can be excluded as irrelevant, it must appear so beyond a reasonable doubt. *See State v. Richardson*, 838 S.W.2d 122, 124 (Mo. App. E.D. 1992); *Bounds*, 857 S.W.2d at 477. If evidence is relevant, then it should not be rejected simply because it tends to arouse prejudice in the jury. *See Friend*, 822 S.W.2d at 944.

“In a criminal proceeding, questions of relevance are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown.” *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). A trial court will be found to have abused its discretion only when a ruling is “clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

### **The Brochure Was Relevant To The Crimes Appellant Was Charged With**

The brochure was relevant to prove the charge of first degree robbery. Under Missouri law, robbery in the first degree can occur in a variety of ways. For instance, first degree robbery may be charged if during the course of taking the victim’s property, the perpetrator displays or threatens the use of what appears to be a deadly weapon or

dangerous instrument. Section 569.020.1 (4). A deadly weapon is “any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged.” Section 556.061(10), RSMo 2000. The jury in this case was instructed to find Appellant guilty of first degree robbery if during the course of taking the victim’s property he or his stepbrother “displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument” (L.F. 34).

Moreover, Appellant was also charged with armed criminal action, which makes it a crime to commit any felony “by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon.” Section 571.015, RSMo 2000. The jury was instructed to find Appellant guilty of armed criminal action if it determined both that he was guilty of robbery and that while committing that offense he or his stepbrother used a deadly weapon or dangerous instrument (L.F. 36).

The gun brochure police found at Appellant’s apartment was relevant to prove the charges against him. The State was required to prove that a deadly weapon was used during the commission of the robbery to support both the first degree robbery and armed criminal action convictions. The brochure showed that Appellant was familiar with semi-automatic pistols in which the ammunition clip goes into the handle. The gun brochure tended to corroborate the victim’s testimony that during the robbery Appellant used a handgun of that type. It also corroborated the victim’s testimony that both Appellant and his step-brother carried guns during the robbery, and it impeached Appellant’s post-arrest statement that only his stepbrother had a gun, which Appellant claimed was a BB pistol.

The brochure's relevancy was enhanced by the fact that Appellant admitted that at least one gun used during the robbery was discarded by him and his stepbrother. Moreover, police never recovered either of the guns used to commit the crime. Appellant's possession of the brochure reinforced the relevancy of the brochure because he had disposed of evidence of the crime. In other words, it was the unlawful action Appellant took in disposing of the gun or guns used to commit the crime, that made the brochure relevant to the issue of whether Appellant had a gun and what type of gun it was.

Appellant's Point Relied On states that the trial court erred in admitting the brochure into evidence because "there was not the slightest evidence that any gun advertised in that brochure, or any gun even remotely resembling any gun advertised in that brochure, was used in the robbery." This is simply not true. The brochure depicts only handguns of the type in which the clip goes into the handle. These are the same type of guns which the victim described as the ones that were pointed at him.

Here, the trial court did not admit a weapon into evidence, only a brochure depicting semi-automatic handguns. Even though Appellant's possession of the brochure was not highly relevant or conclusive to the issue of whether he possessed a handgun during the robbery, it was still relevant nonetheless. Assuming the brochure was only marginally relevant, Appellant still has not carried his burden of showing that its admission into evidence defied logic, or was so arbitrary and unreasonable as to shock the sense of justice. The brochure was relevant; it was for the jury to decide the weight it should be given. *See State v. Friend*, 822 S.W.2d at 944.

Although only a brochure showing handguns was received into evidence here, Appellant complains that this violated the evidentiary principle that prohibits the admission into evidence of any weapon that is unconnected to the crime. But what this Court has held is that a “conviction may be reversed when a weapon admitted into evidence is unconnected to the crime *and* not similar to the weapon involved in the crime.” *State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001) (emphasis added). No Missouri court has considered whether a gun brochure, as opposed to a weapon itself, may be admitted into evidence when the use of a gun was one of the elements of the crimes with which the defendant was charged.

## **Weapons Are Admissible When They Relate To The Crimes Charged**

To the extent that Appellant suggests that a weapon may be admitted into evidence only when it is directly connected to both the defendant and the crime committed, he is simply incorrect. “Weapons not directly connected with the defendant may be admitted into evidence when they bear on the crime with which he is charged.” *Friend*, 822 S.W.2d at 944. Moreover, the weapon’s identity is not required to be “wholly unqualified” before it may be admitted into evidence. *Id.* “It is sufficient if the weapon offered into evidence ‘appeared to be of the same type,’ ‘was very similar,’ and was ‘approximately like’ the one used in the offense.” *Id.* at 944, *quoting State v. Crowley*, 571 S.W.2d 460, 463 (Mo. App. St.L.D. 1978). “The weight to be given to the identification of a weapon is for the jury.” *Id.*

In another context, Missouri courts have long held that weapons not directly connected to the defendant or the crime charged were properly used at trial for demonstrative purposes. “There is no absolute rule that demonstrative evidence of a weapon unconnected with the defendant or offense charged is inadmissible.” *State v. Silvey*, 894 S.W.2d 662, 667 (Mo. banc 1995) (holding that the use of a butterfly knife similar to the one owned by the defendant was proper as a demonstrative exhibit); *see also State v. Nelson*, 484 S.W.2d 306 (Mo. 1972) (a ball-peen hammer similar to the one used in the assault charged and unconnected with the defendant was admissible as a demonstrative exhibit); *State v. Douthit*, 846 S.W.2d 761 (Mo. App. E.D. 1993), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997) (use of a shotgun

not connected with either the defendant or crime charged was proper as a demonstrative evidence to aid the jury in understanding function of shotgun part found in a car with the defendant); *State v. Huff*, 831 S.W.2d 752 (Mo. App. E.D. 1992) (no error in allowing expert to show three shotguns unconnected with the defendant for purpose of showing difference between shotguns which was relevant to the circumstances of the shooting); *State v. Woods*, 637 S.W.2d 113 (Mo. App. E.D. 1982) (admission of gun similar to one used in defendant's escape as demonstrative exhibit not error because it was relevant to material issues).

In *State v. Black*, this Court held that the defendant's capital murder conviction was not reversible because of the admission into evidence of a knife. While this Court held that there was an insufficient foundation on hearsay grounds to admit the knife into evidence as the murder weapon itself, the defendant's conviction would not be reversed because the knife was similar to the weapon used to kill the victim. *Black*, 50 S.W.3d at 786.

In *State v. Friend*, the court held that the trial court properly admitted into evidence a .22 caliber revolver and holster into evidence even though the gun and holster were not in the defendant's possession and were found at separate residences far removed and unconnected to the scene of the assault with which he was charged. *Friend*, 822 S.W.2d at 944. The gun and holster were properly admitted because the assault victim was shot at with a small handgun and police found .22 caliber rounds at the scene of the assault located in the car in which the defendant was riding. *Id.* at 941-42. Moreover, the defendant threw the gun, which the police never recovered, out of the car window after the shooting.

Although Missouri courts have not considered the precise issue in this case, at least one other court has held that gun literature possessed by the defendant may be relevant and properly admissible into evidence. In *State v. Koskovich*, 776 A.2d 144 (N.J. 2001), the court in a capital murder case held that gun magazines (“Combat Handguns,” “Handgunning,” and “Guns and Weapons”) were relevant and properly admitted into evidence to demonstrate the defendant’s familiarity with guns and to support an inference of the defendant’s knowledge and competency to handle firearms. *Id.* at 163.

The brochure was properly admitted into evidence under two theories. First, it was relevant to show Appellant’s familiarity with, and knowledge of, handguns of the type in which the clip goes into the handle. From this the jury could reasonably infer that Appellant or his stepbrother may have carried a handgun of the type the victim described, despite Appellant’s claims to the contrary. Moreover, Appellant’s possession of the brochure corroborated the victim’s testimony that Appellant carried either a gun depicted in the brochure, or a similar one, during the robbery

Second, the brochure was relevant for demonstrative purposes to show the jury what the type of gun the victim described looks like. The prosecutor never argued that any gun depicted in the brochure was one of the guns used during the robbery. But all the guns depicted in Appellant’s brochure are the type in which the ammunition clip goes into the gun handle. Because the guns depicted in the brochure were all similar to the guns the victim described, admission of the brochure into evidence was not improper or prejudicial.

The cases relied on by Appellant are inapposite in that they all involve weapons

wholly unrelated to either the defendant or the crime charged which were admitted into evidence. *See State v. Richards*, 67 S.W.2d 58 (Mo. 1933) (a .32 caliber gun found in defendant's home not properly admitted when the victim was killed with a .38 caliber weapon); *State v. Krebs*, 106 S.W.2d 428 (Mo. 1937) (weapons found in defendant's possession at arrest not properly admitted when no showing that they were the same or similar to the ones used in the crime charged); *State v. Wynne*, 182 S.W.2d 294 (Mo. 1944) (pistol unconnected with the defendant improperly shown to the jury during a demonstration when no proof that the demonstration was similar to circumstances of the crime charged); *State v. Smith*, 209 S.W.2d 138 (Mo. 1948) (guns found in the defendant's wife's purse at the time of his arrest improperly admitted); *State v. Holbert*, 416 S.W.2d 129 (Mo. 1967) (guns found near the defendant at the time of arrest not properly admitted when they were unconnected to the crime charged); *State v. Baker*, 434 S.W.2d 583 (Mo. 1968) (gun found in defendant's house improperly admitted when there was no evidence that it was used to commit the crime charged); *State v. Merritt*, 460 S.W.2d 591 (Mo. 1970) (gun found near crime scene improperly admitted when no evidence connected defendant to the gun); *State v. Davis*, 530 S.W.2d 709 (Mo. App. St.L.D. 1975) (shotgun similar to one used in crime improperly admitted when found in home where defendant did not live and no evidence showed that defendant possessed shotgun or knew of its existence); *State v. Williams*, 543 S.W.2d 563 (Mo. App. K.C.D. 1976) (gun found under front seat of a car in which defendant was riding in the backseat improperly admitted when no showing that gun was connected to either the defendant or the crime charged); *State v.*

*Jones*, 583 S.W.2d 212 (Mo. App. W.D. 1979) (gun found on defendant at arrest improperly admitted when no showing that it was same or similar to gun used to commit the crime charged); *State v. Fristoe*, 620 S.W.2d 421 (Mo. App. W.D. 1981) (court improperly allowed a gun to be shown to the jury that was not the one shown to the crime victims); *State v. Moore*, 645 S.W.2d 109 (Mo. App. W.D. 1982) (gun that the robbery victim testified was not the one defendant used to commit crime improperly admitted); *State v. Perry*, 689 S.W.2d 123 (Mo. App. W.D. 1985) (shotgun found in the defendant's mother's car improperly admitted when robbery was committed with a handgun and no evidence that defendant owned the shotgun or knew of its existence); *State v. Reyes*, 740 S.W.2d 257 (Mo. App. W.D. 1987) (hunting knife found under front seat of car in which defendant was riding in the backseat improperly admitted when victim killed by a shotgun and no evidence connected the knife to either defendant or the crime); *State v. Grant*, 810 S.W.2d 591 (Mo. App. S.D. 1991) (no evidence that pistol used in demonstration to the jury was at all similar to the one used in the crime).

### **Admission of The Brochure Was Not Prejudicial**

Alternatively, even if the brochure was irrelevant, its admission did not constitute reversible error. The admission of irrelevant or inadmissible evidence, otherwise free of prejudice, cannot constitute reversible error. *State v. Scott*, 560 S.W.2d 879, 881 (Mo. App. St.L.D. 1977). Irrelevant or immaterial evidence is excluded, not because it is inflammatory or prejudicial, but because its admission has a tendency to draw the jury's attention from the issues it has been called upon to resolve. *Id.* In fact, in most cases,

“[i]rrelevancy . . . operates to mitigate a claim of prejudice.” *State v. Lager*, 744 S.W.2d 453, 457 (Mo. App. W.D. 1987).

When the defendant complains about the admission of evidence, he has the “dual burden” of establishing that the admission of this evidence was error, and that this error was prejudicial. *State v. Isa*, 850 S.W.2d 876, 895 (Mo. banc 1993). In reviewing for “prejudice,” reversal is warranted “only if the admitted evidence was so prejudicial that it deprived the defendant of a fair trial. *State v. Richardson*, 923 S.W.2d 302, 311 (Mo. banc 1996), *cert. denied*, 519 U.S. 972 (1996). Absent a showing that the evidence inflamed the jury or diverted its attention from the issues to be resolved, admitted evidence, even if immaterial or irrelevant, will not constitute prejudicial error. *State v. Stoner*, 907 S.W.2d 360, 364 (Mo. App. W.D. 1995). Mere allegations of prejudice are insufficient to meet this burden. *Id.*

In determining whether the improper admission of evidence is harmless error this Court employs the “outcome-determinative” test. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000); *State v. Black*, 50 S.W.3d at 786. Improperly admitted evidence is outcome-determinative when it has “an effect on the jury’s deliberations to the point that it contributed to the result reached.” *Id.* at 151. In other words, a finding of outcome-determinative prejudice occurs when “the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence.” *State v. Black*, 50 S.W.3d at 786; *see also State v. Barriner*, 34 S.W.3d at 150.

The admission of the gun brochure into evidence here was certainly not outcome-determinative. First, only a brochure, as opposed to a weapon itself, was admitted into evidence. The jury was not likely inflamed or had its prejudice aroused by the admission of one gun brochure. Neither was the jury's attention diverted from the issue to be resolved. The brochure simply corroborated other relevant evidence concerning whether a gun was used during the robbery, whether Appellant had a gun, and what type of gun it was.

Moreover, there was overwhelming evidence of Appellant's guilt by his own admission to the police. Appellant confessed that he took part in the robbery, that his stepbrother had a gun, and that he threatened the victim with it. "Error which in a close case might call for a reversal may be disregarded as harmless when the evidence of guilt is strong." *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. E.D. 1992). The admission of the brochure into evidence, even if irrelevant, was not outcome-determinative. Its admission into evidence was, at worst, harmless error.

## **CONCLUSION**

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE AND COMPLIANCE**

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief complies with the limitations contained in Rule 84.06 in that it contains 6069 words, excluding the cover, this certification and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on January 14, 2002, to:

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